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No. 52

In the Supreme Court
of the United States

OCTOBER TERM 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon (R. 103-120) is reported at 66 Or Adv Sh 117, 320 P2d 668.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered January 22, 1958 (R. 121). Petitioner's petition for rehearing (R. 122) was denied February 18, 1958 (R. 123). Petition for a Writ of Certiorari was filed April 21, 1958, and was granted June 2, 1958 (R. 123). The jurisdiction of this Court rests on 28 USC 1257(3).

QUESTION PRESENTED

1. An employer, *ex parte,* rejects a state workmen's compensation act;

2. His "twilight zone" employee is injured through the employer's negligence;

3. The employee would be entitled to state compensation benefits but for the employer's rejection;

4. The compensation act grants such employee another remedy against the employer;

Is the employee prevented by the U. S. Constitution and the Longshoremen's Act from exercising such substitute remedy?

The Oregon Supreme Court says: "Yes, such injured employee has no state remedy whatsoever."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are:

(a) U. S. Constitution:

Art III, Sec 2, cl 1.
Art I, Sec 8, cl 18.

(b) Federal Statutes:

Longshoremen's and Harbor Workers' Compensation Act.
33 USC 903.
33 USC 905.

(c) Oregon Statutes:

Workmen's Compensation Act.

ORS 656.006.
ORS 656.022.
ORS 656.024.
ORS 656.028.
ORS 656.084(2).
ORS 656.152.

Employers' Liability Act.

ORS 654.305 to ORS 654.335.

Safety & Health Conditions In Places of Employment.

ORS 654.010.
ORS 654.015.
ORS 654.035.

They are printed in Appendix A, infra, 27-35.

STATEMENT

1. Procedural History and Judgments Below

Petitioner, injured March 23, 1955 while employed by respondent, filed this action in the Circuit Court of the State of Oregon for the County of Multnomah. Prior to petitioner's employment, respondent had rejected the Oregon Workmen's Compensation Act (R. 55, 105). Pursuant to provisions of the Oregon Workmen's Compensation Act (ORS 656.006 and ORS 656.024, App. A 29, 30), petitioner brought this action. Petitioner's complaint alleged respondent's negligence, and violation of provisions of the Employer's Liability Act (R. 1-3, 103, 105). Respondent answered alleging that the Longshoremen's and Harbor Workers Compensation Act (33 USC 901 et seq.) was petitioner's exclusive remedy. This petitioner denied by reply (R. 7).

Upon trial, a verdict was returned for petitioner on February 10, 1956, in the sum of $38,242, and judgment was entered in that amount, plus costs (R. 12, 13). Thereafter, on respondent's motion, the trial court set aside the judgment for petitioner on the sole ground that the Longshoremen's Act was petitioner's exclusive remedy, and entered judgment for respondent (R. 15, 104). The reasoning of the trial court in granting respondent's motion is set forth at the time of respondent's motion for a directed verdict (R. 82).

Petitioner appealed to the Oregon Supreme Court, which on January 22, 1958, affirmed on the sole ground that the Longshoremen's Act was petitioner's exclusive remedy (R. 118). On February 18, 1958, the Oregon Supreme Court denied petitioner's petition for rehearing (R. 123).

2. Facts Material to the Question Presented

A. Respondent's Ross Island Operation

Respondent has been in the business of commercially dredging sand and gravel for private sale for many years. The product comes from the center (lagoon) of Ross Island, which island is located in the navigable Willamette River, State of Oregon (R. 20). The land portion of Ross Island is now shaped like a horseshoe. At the north end there is a single opening allowing the river to come in and form a lagoon (R. 28; See Ex. 4, R. 26, 85). The lagoon is a cul-de-sac (See Ex. 4). Respondent owns, in fee simple, all of Ross Island with no reservation whatsoever (including the east part which is sometimes called Hardtack Island), including all the

land under the lagoon (R. 20). The entire area owned by respondent is enclosed in red pencil on Exhibit 1 (R. 20, 83, 102). All of respondent's property was treated as a single parcel in the original patent from the United States in 1873; and was acquired by respondent as a single entity by deed (R. 20; Exs. A and B, R. 90-97, 102).

Respondent dredges sand and gravel from the bottom of the lagoon and digs away at the sides (R. 20), loading the product on barges, which are towed a short distance to respondent's rock crusher, which is also in the lagoon [(R. 50); see small "o" on Ex. 4, (R. 26, 85), in locating rock crusher in lagoon; Ex. 10, R. 38, 87]. There a conveyor belt conveys all the sand and gravel to shore for sale (R. 76).

Respondent has dredged out enormous quantities of sand and gravel from Ross Island, completely altering its appearance and greatly increasing the size and depth of the lagoon. [Compare Ex. D (R. 101, 102) which is a map of Ross Island in 1895, with Ex. 4 (R. 26, 85), and note the testimony of respondent's president (R. 76, 77), and the stipulation of parties (R. 20).] A large portion of the area between the two islands was originally dry land at least at low water, and has been dug away by respondent in dredging (R. 20).

Respondent operates and alters the lagoon as it pleases (R. 20), having driven hundreds of piling and placed cement piers and anchors throughout (R. 30, 67, 74, 75, 80); built and maintains large towers and tramway terminals in the center of the only entrance to

the lagoon (R. 76: see Ex. 4, R. 26, 85; Ex. 10, R. 38, 87; Ex. 25, R. 66, 89); built a large crushing and screening plant in the lagoon (R. 75); and rents for profit space in the lagoon for parking, breaking up and sorting log rafts and booms, at times blocking off large portions thereof (R. 66-71, 79, 80; see Ex. 4, R. 26, 85); sometimes respondent rents so much lagoon space to log rafters that it makes it difficult to conduct any other operations in the lagoon (R. 71, 79, 80); respondent would eject anyone from the lagoon who desired to stay there without paying respondent's lagoon rental rates (R. 78-80). The U. S. Government has drawn its harbor lines around the property owned by respondent, excluding the entire lagoon (R. 54, 55; Ex. C, R. 99, 102). Respondent's dredging has always been carried on without permit from any governmental authority, and it pays no royalties to any government for sand and gravel removed (R. 20).

B. Petitioner's Employment and Injury

Petitioner's regular employment with respondent was as an oiler on a dredge anchored to the shore (R. 30), dredging sand and gravel from the bottom of the lagoon (R. 29, 33). The place he worked is shown with a small inked "x" (R. 45) on Exhibit 4 (R. 26, 85). All of his work was in the lagoon. He never worked outside the lagoon (R. 27, 28).

March 23, 1955, petitioner did his regular dredge work for several hours (R. 35, 36); he was then ordered to the rock crusher (see small inked "o" on Ex 4 for location in lagoon; R. 50) to do cleanup work (R. 36).

Two of respondent's barges were next to the rock crusher in the lagoon (R. 36, 37). Respondent was transferring a gravel hopper or bin (used to load trucks with gravel on land, R. 36, 37) owned by respondent (R. 63, 73, 74), from one barge to the other (R. 37). [See the "o" (R. 45) on Ex. 4 or the "o" (R. 51) on Ex. 10 (R. 38, 87) for location of barges.] After a land based crane (R. 37, 57) had lifted the hopper from one barge and put it on the other, petitioner, on orders (R. 37), went up a ladder on the hopper to loosen the crane cable (R. 39). The ladder was nailed to the hopper (R. 42). Due to respondent's negligence, and total disregard of established safety rules for ladders (R. 105), the ladder pulled loose from the hopper as petitioner got to the top (R. 46). Petitioner landed on his back on the barge, with the ladder hitting him as it came down (R. 46), and he was seriously and permanently injured (R. 4, 105).

It was at night when petitioner was sent up the ladder (R. 46). Petitioner had never seen the hopper before (R. 50). The ladder was nailed to rotten wood, the whole top of the hopper being rotten (R. 47). There were no bolts or chains securing the ladder to the hopper (R. 47, 48). No one warned petitioner of the condition of the ladder or hopper (R. 48). Petitioner has not worked since his injury (R. 49). At the time of injury, petitioner was 57 years old (R. 4, 6). The hopper, despite its condition, was in continuous active use on land by respondent, and was to be barged across the Columbia River a short distance to Cathlamet, Washington, for use by respondent in connection with its sale of sand and

gravel, it having been brought into the lagoon by another barge from another nearby road job of respondent in Oregon (R. 62, 72).

3. Oregon Law in Relation to Respondent's Actions

The Oregon Workmen's Compensation Act is contained in ORS 656.002 through 656.590. Pertinent provisions are referred to in the next few paragraphs and are printed in Appendix A, infra, 29-31.

Petitioner and respondent were subject to the Workmen's Compensation Act at the time of injury. The Act provides such a sand and gravel operation is a hazardous occupation, and is under the Act [ORS 656.084(2), App. A, 31].

Injured workmen covered by the Compensation Act may only receive specified sums from the State Industrial Accident Fund, and such payments are in lieu of all other claims against the employer (ORS 656.152, App. A, 31).

However, petitioner was not covered by such payments under the Compensation Act because, pursuant to ORS 656.022 (App. A, 29) (part of the Compensation Act), respondent had, *ex parte*, rejected the Act (R. 55, 105).

ORS 656.024 (also part of the Compensation Act) provides that a rejecting employer is entitled to none of the benefits of the Act, and is liable in an action by an employee for injuries occasioned by the employer's negligence, default or wrongful act as if the Act had not been passed, and removes certain defenses (App. A, 30).

ORS 656.006 (App. A, 29) (also part of the Compensation Act) provides that where an employee is authorized under the Compensation Act to bring an action against his employer (see paragraph above), his action may, in applicable situations, be brought pursuant to the Oregon Employer's Liability Act (ORS 654.305 through 654.335; App. A, 31-34). It was pursuant to this provision of the Workmen's Compensation Act (ORS 656.006 as well as ORS 656.024, see paragraph above) that petitioner brought this action.

Respondent had private insurance coverage for its liability under the Oregon Workmen's Compensation Act as rejected (ORS 656.024) and under the Oregon Employer's Liability Act (ORS 656.006; 654.305-654.335) (R. 55).

SUMMARY OF ARGUMENT

Pursuant to the provisions of the Oregon Workmen's Compensation Act, which respondent could unilaterally reject, and did, petitioner was, in such event, entitled to sue respondent for negligence and violation of the Employer's Liability Act.

Petitioner was injured in a "twilight zone" situation.

The decision of the Oregon Supreme Court deprives a "twilight zone" employee of any state remedy if his employer rejects the Act.

About twenty-five states have elective acts similar to Oregon. In addition, there are thousands of "twilight zone" employees all over the United States that are not covered by compensation. This decision, if allowed to

stand, deprives all of them of any state remedy.

Congress never intended to pre-empt the field when it passed the Longshoremen's Act. To the contrary, it attempted to give all possible jurisdiction to the states.

Under the "twilight zone" doctrine as developed by this Court, the Oregon compensation statutes granting to petitioner this substitute remedy are presumed constitutional. The Oregon court ignored the presumption.

There is nothing inherent in the Oregon law involved here that prejudices the uniformity of general maritime law by allowing a recovery. Respondent was guilty of grave and elementary negligence.

Nor is maritime law prejudiced by a recovery under the Employer's Liability Act. No employer is in danger of being subject thereto involuntarily. No employer can be subject to the Employer's Liability Act unless it wants to be. The only way an employer is subject to the Employer's Liability Act is by rejecting the Compensation Act. Nor is the standard of care therein required unreasonable.

Workmen's compensation is socially necessary, humane and desirable. In order to effectively enforce workmen's compensation laws and require compliance in elective states, sanctions are necessary against potential rejecting employers. Thus, unless the statutory sanctions are enforceable against a rejecting employer, the great host of uncovered workers in the United States will increase instead of decrease.

Where the Compensation Act itself provides sanctions against rejecting employers, those sanctions should be treated and enforced, as a part of the Act.

ARGUMENT

The Oregon Supreme Court apparently tacitly agreed (or at least it did not deny) that this case falls within the "twilight zone" as defined in *Davis v. Department of Labor & Industries*, 317 US 249, 63 S Ct 225, 87 L Ed 246. Yet, the court held petitioner ineligible to recover under Oregon law because the recovery did not consist of workmen's compensation benefits as such—but rather was a judgment based on negligence and violation of provisions of the Oregon Employer's Liability Act. Thus, although the Workmen's Compensation Act specifically provides for the very action brought by petitioner against his rejecting employer, the Oregon Supreme Court strictly confined state recovery in the "twilight zone" solely to workmen's compensation payments. This results in petitioner having no state remedy whatsoever.

Many Employees Over the Whole Country Are Affected by This Decision

The significance of this holding is enormous. Obviously, it is important to petitioner that he be allowed local state redress. But it goes much further. There are millions of workers in the United States not covered by any compensation act. Many thousands, perhaps millions, of these people from time to time find themselves on the water or waterfront—on a dock, boat or barge—in a "twilight zone" situation, as did petitioner. This includes persons in all walks of life—carpenters, ship fitters, electricians, delivery men, plumbers, dredge operators, mechanics, helpers, truck drivers, general repairmen, and a host of others. Are all these people to be denied access to the local forum?

The importance of this is pointed up by Bulletin 161 (Revised), State Workmen's Compensation Laws, published by the U. S. Department of Labor, August 1957. At page 2, the following appears:

> "There are great variations in the provisions of the different [compensation] laws. They vary as to type of law, coverage, amounts of benefits paid, insurance requirements, and administrative procedures. Because of coverage limitations, and the fact that about half the laws are elective rather than compulsory, many thousands of workers are still unprotected by these laws. Estimates of the number of workers covered under the State and Federal programs vary. A recent estimate published in the Social Security Bulletin of the Health, Education, and Welfare Department states that in an average week of 1955, 39-40 million workers had protection under the State and Federal workmen's compensation programs. A few years before, the Chamber of Commerce had placed the number at 45 million, and the President's Commission on the Health Needs of the Nation at 35 million.
>
> "These estimates indicate that at most not more than 75 percent of the workers in this country are covered, and the number may be less than 60 percent. This leaves 25 to 40 percent of the total workers without protection under workmen's compensation for injuries suffered on the job. Many of these unprotected workers are included in the 2 million persons each year who suffer occupational injuries and deaths. The yearly average for such injuries and death for the 7 years 1946 to 1952, inclusive, was 17,529 killed or totally disabled for life, 86,243 partially disabled for life, and 1,911,800 more temporarily disabled—a yearly average total of 2,015,557 injuries and deaths."

At page 3, the following appears:

> "An elective act is one in which the employer has the option of of [sic] either accepting or

> rejecting the act, but in case he rejects it he loses the customary common law defenses—assumed risk of the employment, negligence of fellow servants, and contributory negligence. Although most employers elect to come under the act, some do not. In the latter case the employees may be unable to obtain compensation unless they sue for damages. * * *
>
> "Twenty-nine of the workmen's compensation acts are compulsory and 25 are elective for most of the employments covered."

These uncovered workers in the "twilight zone" should not be in the position of petitioner. Petitioner was seriously and permanently injured three and a half years ago. Because he wants to proceed according to his own state law (not federal), to date he has not received one cent in redress, damages or compensation. He is being forced to come to this Court merely to establish his right to maintain an action against his negligent employer who voluntarily, *ex parte* and unilaterally prevented petitioner from obtaining benefits under the state workmen's compensation act.

The question whether these uncovered workers may seek redress pursuant to appropriate state law is of extreme importance.

Petitioner Clearly a "Twilight Zone" Employee

Under the facts as stated supra (3-9), and as stated by the Oregon Supreme Court (R. 104-107), there can be no question that this is a "twilight zone" situation. Factually, it is as strong, or stronger, for state jurisdiction as the facts in the cases of *Davis v. Department of Labor & Industries,* 317 US 249, 63 S. Ct 225, 87

L Ed 246; *Moores' Case* (sub nom Bethlehem Steel Co. v. Moores), 335 US 874, 69 S Ct 233, 93 L Ed 417 (323 Mass 462, 80 NE 2d 478); or *Baskin v. Industrial Accident Commission*, 338 US 854, 70 S Ct 99, 94 L Ed 523 (89 Cal App 2d 632, 201 P2d 549) (sub nom Kaiser Co. v. Baskin), 340 US 886, 71 S Ct 208, 95 L Ed 643 (97 Cal App 2d 257, 217 P2d 733).

Congress Never Intended to Pre-empt the Field or Strictly Confine Recovery to Compensation

The Oregon Court stated:

> "In enacting the Longshoremen's and Harbor Workers' Compensation Act 'Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter.'" (R. 116).

This is most doubtful. The Act was a direct result of the decision in *Southern Pacific Company v. Jensen*, 244 US 205, 37 S Ct 524, 61 L Ed 1086. Twice Congress tried to undo the *Jensen* decision, but this Court struck down the efforts. The very wording of 33 USC § 903(a), (App. A, 27), shows that Congress wanted to give to the states everything this Court would allow (*Davis* case 317 US at 252, 253). The statute was the reluctant act of Congress attempting merely to fill a void created by the *Jensen* decision, where this Court prevented a state remedy. Had Congress wanted to pre-empt the field it could simply have placed all navigable water injuries under the Longshoremen's Act, and deleted the "may not validly be provided by state law" language.

Nor does the reference to "workmen's compensation" in 33 USC § 903(a) confine an injured workman to

workmen's compensation provisions of state statutes. As pointed out in *U. S. Casualty Co. v. Taylor* (CCA 4), 64 F2d 521, 524; cert. den. 290 US 639, 78 L Ed 555:

> "The phrase 'may not validly be provided by State law' obviously refers to the authority of the state to act and not to the inquiry as to whether a state has exercised its power."

(See also *Motor Boat Sales v. Parker* (CCA 4), 116 F2d 789, 793; reversed on other grounds, 314 US 244.) In fact, when the Longshoremen's Act was passed in 1927, five states (N.C., S.C., Miss., Fla. and Ark.) did not even have a workmen's compensation act. Obviously Congress did not intend to deprive injured workmen only in those states of all local remedy.

The remedy petitioner seeks is essentially the same as Congress provided when it enacted 33 USC § 905 of the Longshoremen's Act (App. A, 28); i.e., a workman injured by fault of his employer may sue the employer for damages for negligence with certain defenses removed, where the employer fails to secure payment of compensation as required under the Longshoremen's Act. In other words, as to non-complying employers, the result is approximately the same whether under state or federal law.

The "Twilight Zone" Solution—Presumption of Constitutionality

After years of agonizing hairsplitting on what was maritime employment, this Court in the *Parker v. Motor Boat Sales, Inc.*, 314 US 244, 62 S. Ct 221, 86 L Ed 184, and *Davis* (317 US 249) cases set up a

"twilight zone" area where the injured workman could choose his forum as between federal and state law. By means of presumptions, this Court made it clear it would sustain the workman in his choice of remedy (a recent case, *Richard v. Lake Charles Stevedores* (La) 95 So(2) 830, 831, cert. den. by this Court March 3, 1958, referred to this as "concurrent jurisdiction"). —If the workman chose a state remedy, he would be sustained by the presumption of constitutionality of the state law. The presumption of constitutionality applies to any state law under consideration (*Davis* case, 317 US at 257, 258)—thus, it is *presumed* that the application of the Oregon law in this case (ORS 656.006, 656.024, infra, 29, 30) is constitutional. The Oregon Supreme Court failed to consider or discuss the presumption of constitutionality. There is nothing inimical to this proposition in the case of *Pope & Talbot Inc., v. Hawn*, 346 US 406, 74 S Ct 202, 98 L Ed 143.

No Uniformity of Maritime Law Problem

The Constitution of the United States permits the application of one of 48 different compensation laws in such situations (*Davis* case, 317 US 249) and compensation laws do vary greatly (See Bulletin 161, supra 12). The only uniformity in the various Acts is in their consistent non-uniformity. Thus, there can be no sound reason for drawing the line against the same application of closely related state laws. Particularly is this true where the compensation law in question itself specifically provides for such a remedy by the workman if the employer rejects the Compensation Act.

Such provision appears in about one-half the Acts (supra 13), as in Oregon.

An examination of the facts in the instant case shows that respondent was inexcusably negligent. At night, respondent, without any warning, sent a 57-year-old man up a strange ladder affixed to a structure that was so rotten, and so poorly secured, that the ladder pulled completely away from the structure and fell to the ground as he was reaching the top (supra 7). Such conduct requires no special statute. It is common, ordinary garden variety negligence, reprehensible under any system of law, however conservative or liberal. And the above facts are undisputed. —No fiction, no high standard of care, no liability without fault concept, is necessary. Certainly the doctrine of ordinary negligence is not unknown to general maritime law. Nor would any common law defense have done respondent any good, as shown by the undisputed evidence.

ORS 654.010 (infra 35) requires employers to furnish a safe place of employment. ORS 654.015 (infra 35) forbids unsafe places of employment. ORS 654.035 (infra 35) authorizes the State Industrial Accident Commission to promulgate reasonable safety rules. Such rules have the effect of law, *Shelton v. Paris*, 199 Or 365, 367, 261 P2d 856.

In 1947 the State Industrial Accident Commission promulgated two simple rules as to fixed ladders: (1) They shall be firmly secured in place; (2) They shall be fastened to the structure with through bolts, rivets, or the like.

Petitioner set forth these two rules in his complaint. Respondent admitted them (R. 1, 5). The regulations are conservative and common sense. No one would quarrel with the soundness of either. Violation thereof would scarcely differ from ordinary common law negligence. They propound the obvious. In no way could the enforcement thereof conflict with general maritime law.

The measure of respondent's contempt for the welfare of its workers can be measured not only by its voluntary unilateral rejection of workmen's compensation, but also by its attitude toward those rules. At the trial respondent's president was asked when his company intended to have the ladder bolted to the hopper (as required by the safety rules). He replied that the hopper was built before the regulations were passed (R. 73, 74). —The regulations were passed in 1947 (R. 1, 5), eight years prior to petitioner's injury. The hopper was constructed in 1940 or 1942 (R. 74). Not only was it rotten—it was subjected to constant severe treatment requiring continual repair (R. 74). Yet apparently the respondent *never* intended to comply with the common sense rules calling for simple alteration and repair. Why? Because it erroneously felt it could rely upon the fact that its equipment was so ancient that it predated the regulations! A few bolts and sound boards would have prevented all of petitioner's injuries.

Rarely will a court witness more flagrant or cold blooded negligence of the most basic nature, without even the suggestion of a valid excuse. There is nothing

inherent in the facts or result that will prejudice any maritime law.

Assume for the moment that the provisions of the Employer's Liability Act were required in order to justify petitioner's recovery. If that act is as drastic a remedy as has been previously suggested by respondent, it is unlikely it would have voluntarily subjected itself thereto by rejecting the Compensation Act—particularly as to its land-based employees.

Nor is there any reason to fear that by holding for petitioner that maritime employers generally will be involuntarily subjected to some higher degree of care—unless they want to be. Under the statute, the employer is the sole determiner (ORS 656.022, infra 29). Respondent is only in this Court because it decided to take a chance and reject the Workmen's Compensation Act. It did this purely for its own purposes. It may have thought it was a little cheaper that way. However, upon finding out that its best interests are served by compliance with the Workmen's Compensation Act, the employer has an easy out. A simple letter to the State Industrial Accident Commission will put it back under the Act and out from under ORS 656.024 and 656.006 (infra 29, 30), in five days (ORS 656.028, infra 30).

The Employer's Liability Act does not make an "Involuntary Good Samaritan" out of anyone—to borrow a phrase from Dean Pound: (1) The Employer's Liability Act does not go nearly that far, and (2) no employer is subject thereto unless it, and it alone, voluntarily chooses to be.

Thus, this case differs from any that might be propounded as to a possible "twilight zone" between a compensation act on one hand, and the FELA, the Jones Act, maritime law or the like, on the other. In those situations it might be possibly arguable that any choice of the worker would subject his employer to contingent greater liability, involuntarily.

Finally, when the facts of respondent's operation are considered (supra 4-6), and compared with those of the *Davis* case, or considered on their own, it is preposterous to suggest that petitioner's recovery would work material prejudice to the uniformity of general maritime law in its international and interstate relations. Respondent had complete control over Ross Island and the lagoon and did wholly as it pleased therein. It was dredging sand from the lagoon for sale. Petitioner never left the lagoon. It was strictly a matter of local concern. The "twilight zone" doctrine was designed to cover just such a situation.

* * * * *

The Oregon Supreme Court, in arriving at its decision, places heavy reliance on the case of *Penn. Railroad v. O'Rourke,* 344 US 334, 73 S Ct 302, 97 L Ed 367, (R. 117, 119, 120). True, there is a superficial similarity between *O'Rourke* and the case at hand in that one involves the Federal Employers' Liability Act and this case involves the Oregon Employers' Liability Act. But there the similarity ends. This Court clearly stated in footnote 8 (334 US at 341) of the *O'Rourke* decision that no constitutional question was involved; only the interpretation of two federal statutes. This Court should

clear up this complete misapplication of the *O'Rourke* doctrine by the Oregon Supreme Court.

Sound Policy Requires That Petitioner Be Allowed to Maintain This Action

The Oregon Supreme Court obviously does not like the *Davis, Baskin* and *Moores* solution:

> "In our view, the 'twilight zone' was a contrivance—a 'quasi-legislative decision', Judge Hutcheson called it in the *De Bardeleben* case—for discouraging jurisdictional disputes as between state and federal compensation laws and not as between the Federal Compensation Law and the right to bring an action for damages under state law." (R. 116.)

Be that as it may, this Court recognized the unfortunate results of the *Jensen* decision, the appalling hardship to injured workmen, and rendered a practical solution. The *Jensen* decision assumes less and less formidable proportions as time goes on. (See e.g., *Standard Dredging Corp. v. Murphy*, 319 US 306, 309, 87 L Ed 1416, 1419.)

The decision of the Oregon Supreme Court creates the completely ridiculous anomaly of allowing employers in the 25 elective states to, *ex parte*, make a constitutional determination. That is, if the employer alone, selfishly or otherwise, decides it is best for him to comply with the state Act, his workmen may recover under state law. On the other hand, if the employer decides it is to his sole advantage to reject the Act, his workmen are constitutionally forbidden to recover under any state law. There are few employers who merit this power of constitutional decision.

The obvious purpose of ORS 656.024 and 656.006 (App. A, 29, 30) is to actively *encourage and coerce* employers to comply with the Compensation Act. The same provisions generally appear in all elective acts (See Bulletin 161, supra 13). That was clearly the purpose of Congress in putting the last portion of 33 USC 905 (App. A, 28) into the Longshoremen's Act. Without such provisions, the acts in elective states would be unenforceable. Non-compliance must be made *unpleasant*, or State Industrial Accident Commissions will have no one to administer. The restrictive decision of the Oregon Supreme Court will, to the contrary, actively encourage "twilight zone" employers all over the United States to reject elective compensation acts, and thus effectively prevent their employees from recovering under state law. Whereas, if the Oregon Supreme Court is reversed, the opposite will result. Employers, knowing that they will be subject to actions pursuant to provisions such as ORS 656.024 and ORS 656.006 (App. A, 29, 30) will be considerably less willing and eager to peremptorily reject the Act, as did respondent. Employers should not be allowed to use the U. S. Constitution as a device to thwart the humanitarian purposes of the workmen's compensation acts (See 68 Harvard Law Review 637, 647, 648).

If an employer, for its own purposes, desires to reject the Act, its plaintive voice cannot be heard to cry that it is unconstitutional to apply the substitute remedy *provided by the very Act it rejected* (ORS 656.024, 656.006). To allow employers the initial luxury of rejecting the elective act, and then to escape the

consequences of the substitute remedy thereafter is a modern example of having your cake after having eaten it. If respondent here successfully escapes the consequences, its victory will not remain unnoticed by employers in the other twenty-five elective states. Workmen under all such Acts, and the entire concept of workmen's compensation, will suffer.

It appears wholly illogical to say that the states can constitutionally apply compensation laws, but not other closely related, or substitute, laws. Workmen's compensation laws have a humane purpose—liability without fault. But there can be nothing unconstitutional in allowing a further remedy where there is grave fault as there was in this case—and particularly when the employer is solely responsible for the failure of the compensation provisions of the law to apply—and the compensation law itself provides for that further remedy. (For a generally related interesting discussion, see "Remedies For Personal Injuries to Seamen, Railroad Men, and Longshoremen," 71 Harvard Law Review 438, written by veteran Harvard Law Professor George K. Gardner.)

This Court has from time to time recognized the importance and desirability of workmen's compensation coverage. There can be no serious opposition to such views. The figures quoted, supra (12) are shocking. Millions of workers are still uncovered today. But rejecting employers under elective acts are not going to get under the acts so long as it is to their economic advantage not to do so. It is that simple. If this Court holds that where Workmen's Compensation Acts

provide reasonable sanctions against non-complying employers, as here, that such sanctions as a part of the Act are enforceable, employers are going to pause before happily rejecting Workmen's Compensation Acts. On the other hand, if "twilight zone" rejecting employers are allowed to completely escape the responsibilities of ordinary employers, the whole purpose of the sanctions will be subverted, and the lists of uncovered employees in elective states will grow.

The U. S. Constitution is a broad document, susceptible to intelligent and reasonable interpretation. It is nonsensical and unreasonable to leave any injured workman remediless in his own state only because his employer rejected the Act. The only reasonable interpretation that can be given is—in the "twilight zone" the states may constitutionally apply their workmen's compensation acts, *and* other laws which are supplemental thereto in the event the employer has failed or refused to provide workmen's compensation coverage. Such is only consonant with the Acts themselves. Petitioner, as well as the thousands of other uncovered "twilight zone" employees throughout the country, is entitled to such a reasonable interpretation of the U. S. Constitution.

Under elective compensation laws, employers may legally reject the Acts. But if they do so, it must be with the clear understanding that they are not going to be able to hide behind the U. S. Constitution when their injured employees assert their substitute or alternative remedies provided by the compensation laws. To have effective compensation laws this is essential.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

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APPENDIX A

U. S. CONSTITUTION

ARTICLE III—Section 2, Clause 1:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or, which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies tween two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

ARTICLE 1—Section 8, Clause 18:

"The Congress shall have Power * * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

FEDERAL STATUTES

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT:

33 USC 903:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through work-

men's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

33 USC 905:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

OREGON STATUTES

WORKMEN'S COMPENSATION ACT (ORS 656.002 to 656.590) PERTINENT SECTIONS:

ORS 656.006 EFFECT ON EMPLOYER'S LIABILITY LAW. ORS 656.002 to 656.590 do not abrogate the rights of the employe under the present employers' liability law, in all cases where the employe, under ORS 656.002 to 656.590 is given the right to bring suit against his employer for an injury.

ORS 656.022 EMPLOYERS ENGAGED IN HAZARDOUS OCCUPATIONS AS SUBJECT TO WORKMEN'S COMPENSATION LAW. (1) All persons engaged as employers in any of the hazardous occupations specified in ORS 656.082 to 656.086 shall be subject to ORS 656.002 to 656.590; provided, that any such employer may be relieved of certain of the obligations imposed by those statutes and shall lose the benefits conferred by those statutes by filing with the commission written notice of an election not to be subject thereto in any manner specified in those statutes.

(2) Where an employer is engaged in a hazardous occupation, as defined in ORS 656.082 to 656.086, and is also engaged in another separate occupation or other separate occupations not so defined as hazardous, he shall not be subject to ORS 656.002 to ORS 656.590 as to the separate nonhazardous occupations, nor shall his workmen wholly engaged in such separate nonhazardous occupations be subject thereto except by an election as authorized by ORS 656.034.

(3) Employers who are engaged in an occupation partly hazardous and partly nonhazardous come under ORS 656.002 to 656.590 as if the occupation were wholly hazardous.

(4) It is the purpose of this section that an occupation and all work incidental thereto and all workmen engaged therein shall be wholly subject to or

wholly outside the provisions of ORS 656.002 to 656.590.

ORS 656.024 ELECTION OF EMPLOYER ENGAGED IN HAZARDOUS OCCUPATION NOT TO CONTRIBUTE: LIABILITY OF EMPLOYER SO ELECTING. Before becoming engaged as an employer in any hazardous occupation defined by ORS 656.082 to 656.086, the employer may file with the commission a statement in writing declaring his election not to contribute to the Industrial Accident Fund, and thereupon shall be relieved from all obligations to contribute thereto. Such employer shall be entitled to none of the benefits of ORS 656.002 to 656.590 and shall be liable for injuries to or death of his workmen, which are occasioned by his negligence, default or wrongful act as if such statutes had not been passed. In any action brought against such an employer on account of an injury sustained by his workman, it shall be no defense for the employer to show that:

(1) The injury was caused in whole or in part by the negligence of a fellow-servant of the injured workman.

(2) The negligence of the injured workman, other than his wilful act committed for the purpose of sustaining the injury, contributed to the accident.

(3) The injured workman had knowledge of the danger or assumed the risk which resulted in his injury.

656.028 RECALL OF REJECTION; EFFECTIVE DATE. An employer who has elected not to contribute to the Industrial Accident Fund may at any time recall such rejection by filing written notice with the commission of his election to become subject to ORS 656.002 to 656.590. Upon such election becoming effective, the employer shall be and continue in all respects subject to such statutes. Such election shall become effective five days after the filing thereof, unless otherwise stipulated between the

commission and the employer.

ORS 656.084 LIST OF HAZARDOUS OCCUPATIONS. The hazardous occupations to which ORS 656.002 to 656.590 are applicable are as follows: * * *

(2) The operation of gravel, sand or coal plants or bunkers; flour, feed or chop mills; creosoting or wood-treating works; garbage works; wood saws, stockyards, tanneries, grain elevators, rock crushers, briquet plants, ice plants, cold storage plants, canneries, milk condenseries, creameries, foundries, blast furnaces, mines, gas works, water works, reduction works, breweries, distilleries, wineries, wharves, docks, smelters, powder works or quarries.

ORS 656.152 WHAT ARE COMPENSIBLE INJURIES; RIGHT TO COMPENSATION AS IN LIEU OF CLAIM AGAINST EMPLOYER. (1) Every workman subject to ORS 656.002 to 656.590 while employed by an employer subject to ORS 656.002 to 656.590 who, while so employed, sustains personal injury, or injury to prosthetic appliances by accident arising out of and in the course of his employment and resulting in his disability, or the beneficiaries of such workman, if the injury results in death, are entitled to receive from the Industrial Accident Fund the sums specified in ORS 656.002 to 656.590. The repair or replacement of prosthetic appliances so injured shall be provided subject to the approval of the commission.

(2) The right to receive such sums is in lieu of all claims against his employer on account of such injury or death, except as otherwise specifically provided in ORS 656.002 to 656.590.

EMPLOYERS' LIABILITY ACT:

ORS 654.305 PROTECTION AND SAFETY OF PERSONS IN HAZARDOUS EMPLOYMENT GENERALLY. Generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and pre-

caution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

ORS 654.310 PROTECTIVE MEASURES TO BE OBSERVED REGARDING CERTAIN MACHINES, EQUIPMENT AND DEVICES WHICH ARE DANGEROUS TO EMPLOYES. All owners, contractors, sub-contractors or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6) All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the

safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power.

(7) In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the employees of the owner, contractor or sub-contractor transmitting or using the electricity are liable to come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

ORS 654.315 PERSONS IN CHARGE OF WORK TO SEE THAT ORS 654.305 TO 654.335 IS COMPLIED WITH. The owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

ORS 654.320 WHO CONSIDERED AGENT OR OWNER. The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe.

ORS 654.325 WHO MAY PROSECUTE DAMAGE ACTION FOR DEATH; DAMAGES UNLIMITED. If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs and, if

none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named.

ORS 654.330 FELLOW SERVANT'S NEGLIGENCE AS DEFENSE. In all actions brought to recover from an employer for injuries suffered by an employe, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employe was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act or any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

ORS 654.335 CONTRIBUTORY NEGLIGENCE. The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

SAFETY AND HEALTH CONDITIONS IN PLACES OF EMPLOYMENT:

ORS 654.010 EMPLOYERS TO FURNISH SAFE PLACE OF EMPLOYMENT. Every employer shall furnish employment and a place of employment which are safe for employes therein, and shall furnish and use such safety devices and safeguards, and shall adopt and use such practices, means, methods, operations and process as are reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life and safety of such employes.

ORS 654.015 UNSAFE PLACE OF EMPLOYMENT PROHIBITED. No employer, owner or lessee of any real property in this state shall construct or cause to be constructed or maintained, any place of employment that is not safe.

ORS 654.035 SCOPE OF RULES AND ORDERS OF THE COMMISSION. The commission may, after a hearing had upon its own motion or upon complaint, by general or special orders, rules and regulations, or otherwise:

(1) Declare and prescribe what safety devices, safeguards or other means or methods of protection are well adapted to render the employes of every employment and place of employment safe as required by law or lawful order.

(2) Fix reasonable standards and prescribe, modify and enforce such reasonable orders for the adoption, installation, use, maintenance and operation of safety devices, safeguards and other means or methods of protection, to be as nearly uniform as possible, as may be necessary to carry out all laws and lawful orders relative to the protection of the life and safety of employes in employment and places of employment.

(3) Fix and order such reasonable standards for the construction, repair and maintenance of places of employment and equipment as shall render them safe.

(4) Require the performance of any other act which the protection of the life and safety of employes in employments and places of employment may demand.